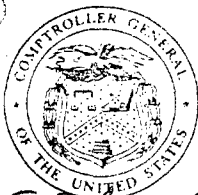


12908 PL-1
Mr. Carter

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

[Protest of FDA Contract Award]

FILE: B-196167.2

DATE: February 20, 1980

MATTER OF: National Micrographics Systems, Inc. DLG 0394B

DIGEST:

1. Protest after award against failure to issue invitation for bids as small business set-aside consistent with notice of set-aside in Commerce Business Daily is untimely because alleged impropriety apparent in solicitation must be protested prior to bid opening.
2. Allegation that large business was nonresponsive is without merit since solicitation did not contain required notice that procurement was small business set-aside, even though Commerce Business Daily erroneously contained such notice.
3. In brand name or equal procurement of fairly common commercial item, listing of specifications of offered equal product which parrots list of required salient characteristics combined with brochure on related model of portable fiche reader is sufficient to permit assessment of compliance with requirements of solicitation.

National Micrographic Systems, Inc. (NMSI), has protested an award by the Food and Drug Administration (FDA) of a contract to Computer Micrographics, Inc. (CMI), for portable microfiche readers. For the reasons stated below, NMSI's protest is denied in part and dismissed in part. AGC00048
CNG02254

The FDA initiated the procurement by publication of a notice in the Commerce Business Daily (CBD) on August 27, 1979, advising prospective bidders of FDA's

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intent to purchase a quantity of portable front-projection microfiche readers. The CBD announcement referred to "note 42" which advised that the procurement was a total small business set-aside. The invitation for bids (IFB), issued on a brand name or equal basis, did not indicate that the procurement was set aside for small business. The FDA states that the CBD notice was in error, but that the error was not discovered in time to submit a correction. Of the several firms submitting bids, CMI was the second low bidder and NMSI third low. The low bid was determined to be nonresponsive.

NMSI first contends that FDA was bound by the terms of the CBD notice to conduct a small business procurement and that CMI was nonresponsive because it is a large business. We see two possible interpretations of NMSI's argument--either (1) the CBD notice was controlling, even though the IFB improperly omitted the small business limitation, and, therefore, CMI's bid was nonresponsive, or (2) the CBD was not controlling but the IFB should have contained a small business requirement.

Under our Bid Protest Procedures, 4 C.F.R. part 20 (1979), NMSI's second contention is untimely because the alleged impropriety, apparent on the face of the solicitation, was not protested until after bid opening. 4 C.F.R. § 20.2(b)(1). This portion of NMSI's protest, therefore, is dismissed.

With regard to the argument that because the CBD notice is controlling and, therefore, CMI is nonresponsive as it is a large business, we note that this procurement was not an effective set-aside as the solicitation did not contain the notice thereof required by Federal Procurement Regulations § 1-1.706-5 (1964 ed. amend. 192).

The balance of NMSI's protest is based on the contention that CMI's bid was nonresponsive because CMI's descriptive literature did not show "with particularity the exact manner in which the product * * * meets each and every one of the 'salient characteristics.'" In this connection, the IFB listed 15 requirements, such as weight and dimension limits,

pertaining directly to the equipment and required bidders offering an "equal" product to provide sufficient descriptive material to permit the FDA to ascertain compliance with the requirements and determine exactly what it would be buying. Bidders proposing to modify their products were required to provide a clear description of the proposed modifications and mark any descriptive material to show the proposed modifications. CMI's descriptive literature consisted of two pages on which it was stated that CMI's model MXS-11 reader was "designed to conform exactly" with this solicitation and contained a listing of MXS-11 specifications corresponding exactly to the IFB's list of required salient characteristics and was accompanied by a third page containing a picture and specifications of a sister model "enclosed to illustrate some of the features of the MXS-11 as it looks very similar."

A bid need not comply literally with the solicitation's requirements in order to be responsive. The Entwistle Company, B-192990, February 15, 1979, 79-1 CPD 112. The test of responsiveness of a bid is "whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof." 49 Comp. Gen. 553, 556 (1970). The responsiveness of an "equal" bid submitted in response to a brand name or equal procurement is dependent on the completeness and sufficiency of the descriptive information submitted with the bid, previously submitted information, or information otherwise reasonably available to the purchasing activity. Risi Industries, Inc.; Westmont Industries, B-191024, April 27, 1978, 78-1 CPD 329.

In this procurement, the item being procured was a fairly common commercial grade item rather than a highly complex and specialized piece of equipment requiring intimate detail for analysis. While the mere parroting back of salient characteristics is not sufficient to meet a descriptive data requirement, we are not prepared to find that CMI's listing of MXS-11

specifications, coupled with the illustrative brochure of the "sister" rear-projection model, was insufficient to permit FDA to assess CMI's compliance with the requirements of the solicitation. In fact, it is our view that the only reasonable interpretation of CMI's bid was that the MXS-11 brochure of the "sister" rear-projection model was submitted to show how it would be modified, as permitted by the solicitation provisions, to meet the salient characteristics.

The protest is denied in part and dismissed in part.

A handwritten signature in dark ink, appearing to read "R. F. Keller". The signature is fluid and cursive, with a large initial "R" and a long, sweeping underline.

Deputy Comptroller General
of the United States